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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 2005

JAMES S. JOHNSON,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for Writ of Certiorari to the Illinois Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether prosecutor's statements in opening and closing arguments creating an inference that the Defendant had a duty to prove his own innocence constitute a violation of the Defendant's right to due process and entitle the Defendant to a new trial.

Whether the failure of Defendant's counsel to object to statements made in the prosecutor's opening and closing arguments inferring that the Defendant had a duty to prove his own innocence violated his right to effective assistance by counsel and entitle the Defendant to a new trial.

LIST OF PARTIES

The parties are as stated in the caption hereto.

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TABLE OF AUTHORITIES

CASES:

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Arizona v. Fulminante, 499 U.S. 279, 310

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Gideon v. Wainwright, 372 U.S. 335, 342-343,
83 S.Ct. 792 (1963),

McKaskle v. Wiggins, 465 U.S. 168, 177 n. 8,
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Tumey v. Ohio, 273 U.S. 510, 535, 47 S.Ct. 437.

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113 S.Ct. 2078.

Neder v. United States, 527 U.S. 1, 10-11,
119 S. Ct. 1827 (1999).

Coffin v. United States, 156 U.S. 432, 453,
15 S.Ct. 394, 403 (1895)

Estelle v. Williams, 425 U.S. at 503, 96 S.Ct. 1691

Taylor v. Kentucky, 436 U.S. at 486 n. 13,
98 S.Ct. 1930.
United States v. Duarte, 246 F.3d 56, 60 (1st Cir.2001)

United States v. Dominguez Benitez, 124 S.Ct. 2333 at 2339 (2004)

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)

CONSTITUTION:

U.S. Const. Amend. 5
U.S. Const. Amend. 6
U.S. Const. Amend. 14

PETITION FOR A WRIT OF CERTIORARI

James S. Johnson respectfully petitions for a writ of certiorari to review the judgment of the Illinois Supreme Court in this case.

OPINIONS BELOW

The opinion of the Illinois Supreme Court, with dissenting opinion and dissent upon denial of rehearing is reported at 218 Ill.2d 125, 842 N.E.2d 714 (Dec. 15, 2005). The opinion and order of the Appellate Court of Illinois is reported at 819 N.E.2d 1233 (Ill. App. 4 Dist., Dec. 3, 2004).

JURISDICTION

The judgment of the Illinois Supreme Court was entered on December 15, 2005, and a timely petition for rehearing was denied on February 2, 2006. The Court's jurisdiction rests on 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 5 of the United States Constitution provides that "No person shall be... [d]eprived of life, liberty, or property, without due process of law."

Amendment 6 of the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right... [t]o have the Assistance of Counsel for his defence."

Amendment 14, Section 1 of the United States Constitution holds that "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

On April 30, 2003, the Petitioner was charged with improper lane usage and driving under the influence of alcohol. The charge of improper lane usage was dismissed and Petitioner was tried on the remaining charge, driving under the influence of alcohol. (R. Vol. I, 3-4).

At approximately 4 p.m., the Petitioner met with a group of friends at the Lake of the Woods Golf Course in Mahomet, Illinois, for a weekly golf game. (R. Vol. II, 12). As was his habit after these golf outings, the Petitioner and his friends drove to a restaurant/bar around 8:00 p.m. to settle their bets and have food and a couple drinks. (R. Vol. II, 15). While there, Petitioner had two more drinks, the first at 8:15 p.m. and the second closer to 9:00 p.m., leaving around 9:30 p.m. to drive to his home in Savoy, Illinois. (R. Vol. II, 16). Shortly thereafter, Petitioner was stopped by Mahomet Police Officer Parsons for improper lane usage, claiming that Petitioner's tires crossed over the center line three times in an effort to pass the vehicle in front of him. (R. Vol. I, 74). Defendant responded immediately, slowly pulling over to the side of the road (R. Vol. I, 102), and was subsequently charged with driving under the influence of alcohol in violation of Section 11-501(a)(2) of the Illinois Vehicle Code. 625 ILCS 5/11-501(a)(2) (West 2002).

A jury trial was held where the prosecutor made an opening statement that ended with the following remarks:

> "Finally, I believe you're going to hear that Mr. Johnson was given the opportunity to prove to the officer that he was not overly impaired by being offered to take what is called a breath alcohol test to determine how

much alcohol was on his breath at the time, yet the defendant failed to do so." (R. Supp., I).

Without objection by Petitioner's counsel, the prosecutor presented its only witness, Mahomet Police Officer David Parsons. He claimed that when he and the Petitioner began speaking, he noticed a strong odor of an alcoholic beverage emitting from his mouth. (R. Vol. I, 43-44). He admitted that he would not classify the odor of alcohol as being the highest degree, just that "it was a very clear smell." (R. Vol. I, 45). Additionally, Officer Parsons admitted on cross-examination that a strong odor of alcohol may result when an individual has drank something very recently. (R. Vol. I, 121-22). When Officer Parsons requested Petitioner's license and insurance card, Petitioner mistakenly handed his license and registration. (R. Vol. I, 45). Once Officer Parsons pointed out this mistake, Petitioner provided him with his insurance card. (R. Vol. I, 46). Officer Parsons claimed that he noticed that Petitioner's speech seemed to be slurred and that his eyes were bloodshot. (R. Vol. I, 46). Officer Parsons then requested that Petitioner submit to some field sobriety tests. (R. Vol. I, 46). Officer Parsons admitted that he did not notice anything unusual about the Petitioner at this time. (R. Vol. I, 48). He admitted that Petitioner did not stumble out of the vehicle nor did he use his vehicle for support. (R. Vol. I, 118). He admitted that the Petitioner did not stagger or lose his balance while walking. (R. Vol. I, 119). Officer Parsons requested that Petitioner complete the "walk and turn" test as well as a "one leg stand" test. (R. Vol. I, 51, 62). Officer Parsons claimed that Petitioner failed the "walk and turn" test because he allegedly had to be reminded several times to keep his right foot closely in front of his left foot. (R. Vol. I, 59). The Petitioner testified that he was not instructed to use a line when completing the test. (R. Vol. II, 26). Officer Parsons

testified that he could not remember whether he used a designated straight line, as required by the Illinois State Police Standardized Field Sobriety Testing, or an imaginary line when conducting this test. (R. Vol. I, 113-114). Officer Parsons claimed that Petitioner failed to perform the "walk and turn" test at a normal gait and that he raised his arms approximately 14 inches from his body.. (R. Vol. I, 60). Officer Parsons alleged that Petitioner was unable to pivot on his left foot without pausing to regain his balance. (R. Vol. I, 61).

Officer Parsons claimed that Petitioner failed the "one leg stand" test because "he was swaying while he was doing the exercise...[h]is arms were about 10 inches from his sides, and he - - at one thousand eight put his foot down on his own." (R. Vol. I, 67). The test requires that the individual keep his leg up for approximately 30 seconds. (R. Vol. I, 69). The site where the field sobriety test was conducted was alongside the roadway where the road drains away slightly. (R. Vol. II, 117). During cross-examination, Officer Parsons admitted that the roadway drains away slightly from the roadway where the field sobriety tests were conducted. (R. Vol. I, 117). Petitioner similarly testified to the condition of the roadway during his direct examination. (R. Vol. II, 23). A videotape demonstrating the slant in the roadway was also presented. (R. Vol. II, 20-24).

Officer Parsons believed that the Petitioner was under the influence of alcohol and placed him under arrest. (R. Vol. I, 77). Officer Parsons then put Petitioner into the back of his squad car and the two men waited for the tow truck to arrive. (R. Vol. I, 78). Officer Parsons read Petitioner the Warning to Motorists, which is a document that officers are required under state law to read before asking an individual to submit to a chemical test. (R. Vol. I, 79). This Warning to Motorists informs the individual of the different penalties which may result from one's refusal

to submit to chemical testing as well as the penalties if one submits to the testing. (R. Vol. I, 80). Officers are also required to provide a copy of the Warning to Motorists to the individual. (R. Vol. I, 96). However, Officer Parsons admitted he only read the document to the Petitioner. (R. Vol. I, 96). Almost an hour later, while in jail, Petitioner was provided with a copy of the Warning to Motorists. (R. Vol. I, 96-97). After informing the officer that he understood the various penalties contained in the Warning to Motorists, the Petitioner declined to submit to a breath test. (R. Vol. I, 85). After Officer Parsons completed his testimony, the State of Illinois rested its case.

Petitioner then presented a number of witnesses in his defense. The first witness was James Capel, who testified that he saw Petitioner at the golf course and at the Hide-Away of the Woods restaurant and bar. (R. Vol. I, 137). Mr. Capel testified that he saw Johnson walk to his home to have a drink at the golf course. After the game, around 8 p.m. he met up with the Petitioner at the Hide-Away of the Woods, where he saw the Petitioner have one drink before he left at about 9 p.m. (R. Vol. I, 137-138). Mr. Capel testified that the Petitioner did not have difficulty walking or talking and that he normally spoke with a slight slur or mumble sometimes making it difficult to understand him. (R. Vol. I, 141).

The Petitioner's next witness was Daniel Stites, the bartender at the Hide-Away of the Woods. Daniel Stites testified that he served the Petitioner one or two Rum and Cokes. (R. Vol. I, 147). Daniel Stites did not observe the Petitioner having any problems walking or standing. (R. Vol. I, 150). He also did not observe any other signs of impairment or intoxication. (R. Vol. I, 150).

Jody Lynn Gordon, a patron at the Hide-Away of the Woods, then testified that she was at the restaurant from about 8:15 p.m. until 9 p.m. Gordon testified that she did not notice any signs of impairment or intoxication of the

Petitioner that night while she was speaking to him or while he was mingling with other people. (R. Vol. I, 157, 160).

Miles Stites, who was also a patron at the Hide-Away of the Woods on the night in question, testified that he left at the same time that the Petitioner left and that he was walking and talking normally, without appearing to be affected by the alcohol he drank. (R. Vol. I, 168-169).

The last witness was the Petitioner himself. Two videotapes and a number of photographs of the road where Officer Parsons first saw defendant and where the traffic stop took place were identified by the Petitioner and shown to the jury. The Petitioner used the photographs to show the painted yellow lines on the road where he crossed the center line, disputing Officer Parson's claim that any attempted pass would have been illegal. Petitioner used the videotapes to show the degree of slope in the road where the field sobriety tests were conducted. Additionally, the Petitioner stated that the two drinks he had at the Hide-Away only "relaxed" him and did not interfere with his ability to function in any way. When it was pointed out that he refused the breath test knowing that he would be facing a longer suspension of his driver's license if he refused, the Petitioner stated:

> "That's not the reason. At the time I was handcuffed in the back of the car. You know, I just had two drinks. I don't know legally how the test results with just having two drinks. I wasn't going to put myself in that position so I declined to take the test. I was scared. He was not acting in my favor, I didn't feel."

Following the Petitioner's testimony, the prosecutor gave his closing argument. The prosecutor admitted that "it's pretty clear that Mr. Johnson was not falling down drunk." At the close of the argument, the prosecutor stated:

> "Officer Parsons thought that [defendant] was impaired based on his performance on the field sobriety test, based on the alcohol that he smelled, based on watching [defendant] drive, based on the fact that [defendant] gave him the wrong card initially, gave him a registration card instead of an insurance card. He said, you know what? I am going to give you one more chance to prove that you're not guilty of this offence. Take a breath test. You're aware of the penalties that might result with this test and as a result of not taking it at all. You heard Mr. Johnson testify. He understood it. He knew what he was doing. He refused. He didn't want to take the risk. He took the stiffest penalty right off the bat. He wouldn't take the chance to prove it once and for all." *Johnson,* 353 Ill. App.3d at 958, 819 N.E.2d 1233.

Petitioner's counsel made no objections to the remarks, and after being instructed, the jury deliberated for about four hours returning a verdict of guilty to the charge of driving while under the influence of alcohol.

Petitioner's counsel then filed a post-trial motion seeking judgment notwithstanding the verdict, or, in the alternative, a new trial. At the hearing, the Petitioner argued that because the evidence was so closely balanced, the improper arguments by the prosecutor in the opening and closing statements tipped the balance against the defendant. The trial court denied the defendant's post-trial motion. The trial court found that the prosecutor's remarks were an error of "[c]onstitutional magnitude" and that the evidence was "closely balanced." (R. Vol. III, 24). The trial judge admitted that he was "by no means confident of [his] position" and held: "I am not convinced that a fair

trial was so subverted by the comments as to require the Court to grant the post-trial motion." (R. Vol. III, 24).

The Appellate Court of Illinois reviewed the matter and held that the prosecutions opening and closing remarks were not error at all, suggesting that "evidence of a defendant's refusal to take a breath test is relevant and admissible."

The Illinois Supreme Court granted leave to appeal and upheld the conviction on different grounds. The Court held that:

> "We agree with the prosecutor, the trial court judge, and the dissenting appellate justice and find that the remarks made in opening and closing argument, which suggest that defendant failed to prove his innocence to the police officer by failing to take the breath test, were improper and that as a result, error occurred." *Johnson,* 218 Ill.2d at 140, 842 N.E.2d at 723.

The Court held, however, "[T]here may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless." *Johnson,* 218 Ill.2d at 141, 842 N.E.2d at 723 quoting *Chapman v. California*, 386 U.S. 18, 12, 87 S. Ct. 824, 827 (1967). Quoting *United States v. Olano*, the Court held that where the defendant has made a timely objection and the reviewing court must decide whether the preserved error was harmless, the State "bears the burden of persuasion with respect to prejudice." *Johnson,* 218 Ill.2d at 142, 842 N.E.2d at 724 quoting *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1778 (1993). "[i]t is the defendant rather than the [State] who bears the burden of persuasion with respect to prejudice." *Johnson,* 218 Ill.2d at 142, 842 N.E.2d at 724 quoting *Olano,* 507 U.S. at 734, 113 S. Ct. at 1778.

In deciding the question of whether the improper remarks made in opening and closing argument were sufficiently prejudicial so as to require reversal, however, the Court held that the Petitioner did not meet his burden of proof that the improper comments deprived him of a fair trial:

> "Having considered the prosecutor's improper remarks in the context of the closing argum nt as a whole, we find that defendant has failed to persuade us that the verdict would not have been the same had the improper remarks been omitted. We find that the prosecutor's improper remarks were not so prejudicial that real justice was denied. We are convinced that the jury verdict was unaffected by the improper comments. We conclude that defendant was not deprived of a fair trial, that no plain error occurred, and, thus, reversal is not warranted." *Johnson,* 218 Ill.2d at 143, 842 N.E.2d at 725.

The Illinois Supreme Court, in considering whether Petitioner's claims of ineffectiveness of counsel were valid, then held that "... even if counsel's failure to object amounts to deficient performance, we do not find that defendant was sufficiently prejudiced by this deficient performance." *Johnson,* 218 Ill.2d at 144, 842 N.E.2d at 725. Justice Freeman and Justice Kilbride filed a dissenting opinion the case. *Johnson,* 218 Ill.2d at 146-144, 842 N.E.2d at 725.

All issues have been preserved for federal appeal. The issues of the shifting of the burden of proof and ineffectiveness of counsel were raised at the trial court level when Petitioner was seeking a new trial. At the trial court, Illinois Appellate Court, and Illinois Supreme Court, these constitutional issues were asserted by the argument

over how the federal constitution had been applied by the Illinois Courts.

REASONS FOR GRANTING THE WRIT

The Decision below has decided a Federal Question of Substance in a way probably not in accord with applicable decisions of this Court.

In the case at bar, however, the Illinois Supreme Court failed to analyze the issues using the proper standards. Under the case regime related to *United States v. Olano*, the Illinois Supreme Court should have considered the possibility that the occurring errors were structural errors because they deprive a criminal defendant of those basis protections that enable a trial to serve as a vehicle for reliably determining guilt or innocence. See *Arizona v. Fulminante*, 499 U.S. 279, 310. See also *United States vs. Padilla*, 415 F.3d 211 (1st Cir. 2005). A structural error, which may not be found harmless, is a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. In distinguishing a structural error from a garden-variety trial error, a structural error "transcends the criminal process," *Fulminante*, 499 U.S. at 311, by depriving a defendant of those "basic protections, [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." Rose v. Clark, 478 U.S. 570, 577-578, 106 S. Ct. 3103 (1986). Examples of such errors include a withholding of the right to counsel at trial, *Gideon v. Wainwright*, 372 U.S. 335, 342-343, 83 S.Ct. 792 (1963), a denial of the right of self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8, 104 S.Ct. 944 (1984), or the specter of a biased judge presiding over a case, *Tumey v. Ohio,* 273 U.S. 510,

535, 47 S.Ct. 437. See *Padilla,* 415 F.3d at 219. Structural errors may also extend to the denial of the right to a jury verdict of guilt beyond a reasonable doubt. *Sullivan v. Louisiana,* 508 U.S. 275, 280-282, 113 S.Ct. 2078. However, failing to instruct the jury of the reasonable doubt standard on a single element of an offense by itself is not structural error. *Neder v. United States,* 527 U.S. 1, 10-11, 119 S. Ct. 1827 (1999).

The Illinois Supreme Court's analysis in this case is flawed because it failed to examine the error in the context that the error could be structural in nature. As stated in this case's dissent upon denial of rehearing, Justice Freeman states that:

> "[I] submit that an argument that has the potential to confuse the jury about the presumption of innocence and the State's burden of proof strikes at the core of our criminal jurisprudence and serves to compromise any verdict of guilt rendered by that jury. In this case, it is difficult to have any confidence in the verdict because it was reached by a jury that was given mixed messages on the burden of proof, which in turn negatively impacted upon defendant's constitutional right to the presumption of innocence. Given the critical importance of the presumption of innocence in our criminal justice system, I believe that it is questionable that this kind of error can ever be found harmless, even in a case where the evidence is overwhelming. However, this was not a case of overwhelming evidence. To the contrary, this was a closely balanced case, as the court recognized..." *Johnson,* 218 Ill.2d at 147, 842 N.E.2d at 726-727.

Our nation's jurisprudence has closely-guarded this standard through its history. "[T]he principle that there is a presumption of innocence in favor of the accused is undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of our criminal law." *Coffin v. United States,* 156 U.S. 432, 453, 15 S.Ct. 394, 403 (1895). "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams,* 425 U.S. at 503, 96 S.Ct. 1691. It is applicable to state proceedings and is considered to be "an element of Fourteenth Amendment due process." *Taylor v. Kentucky,* 436 U.S. at 486 n. 13, 98 S.Ct. 1930. In *Estelle v. Williams,* the U.S. Supreme Court stated that "the right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment" and "the presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of justice." *Estelle v. Williams,* 425 U.S. at 503, 96 S.Ct. 1691.

Even in the event that this Court will not recognize the error at hand as structural in nature, the Illinois Supreme Court, in considering *United States v. Olano*, failed to apply the proper analysis. A reviewing court may reverse a procedurally defaulted error if the appellant can demonstrate (1) that an error occurred (2) which was clear or obvious and which not only (3) affected the defendant's substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings." *United States v. Duarte,* 246 F.3d 56, 60 (1st Cir. 2001). *Padela,* 415 F.3d at 218.

In the case at hand, all four tests are satisfied. Without a doubt, as held by the Illinois Supreme Court, the first two tests are met. The third test was examined recently by this Court in *United States v. Dominguez Benitez,* holding that the prejudicial effect on the outcome of the proceeding must be "substantial and injurious."

United States v. Dominguez Benitez, 542 U.S. 74, 124 S.Ct. 2333 at 2339 (2004). As Justice Freeman points out in the dissenting opinion,

> "The effects of juror confusion in cases like this, where this court acknowledges the closeness of the evidence, are not readily discernable. For this reason, I find that it is impossible to say with certainty that the error did not help to sway the jury to a finding of guilty as opposed to a finding of not guilty. The record reveals that Defendant called four witnesses who were with him before his arrest, each of whom disputed that defendant displayed the signs of intoxication allegedly observed by Officer Parsons. Defendant testified that he did not cross the center of the road because of intoxication, but rather because he was trying to assess whether he could safely pass the car in front of him. Officer Parsons admitted that a car was in front of defendant at the time he pulled him over, but that it was illegal to pass in that area. Defendant presented the jury with videotapes of the road where the arrest occurred, which established that passing in that area was, in fact, legal." *Johnson*, 218 Ill.2d at 145, 842 N.E.2d at 726.

For the same reasons as Justice Freeman stated, we believe that the third prong of the test has been sufficiently met.

Additionally, the fourth element of the plain error formulation is satisfied. The misstatements by the prosecutor do impugn the fairness, integrity, or public reputation of the criminal proceeding as a whole.

Uncorrected statements by a prosecutor that shift the burden injure the public's perception that they will be treated fairly and their constitutional rights will be respected in the event they are the accused. Furthermore, the decision below, if permitted to stand, creates an incentive for prosecutors to attempt to shift the burden of proof by making improper remarks at trial.

> "If making such a remark is deemed harmless in a case like this, where the defense has successfully damaged the credibility of the arresting officer – the sole witness for the prosecution – with videotaped evidence, I cannot fathom under what circumstances this error will ever be deemed harmful enough to warrant a new trial. In my opinion, this kind of result leaves little incentive for the State to avoid making the improper remark in future cases." J. Freeman dissenting in *Johnson,* 218 Ill.2d at 145-146, 842 N.E.2d at 726.

The Illinois Supreme Court also found that reversal was not required due to ineffective assistance of counsel. The Court held that the two-prong, performance-prejudice test established in *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052 (1984), would apply. *Johnson,* 218 Ill. 2d at 143, 842 N.E.2d at 725. While the Court determined that the prosecutor's comments were improper and that it follows that defense counsel erred by failing to object, the Court held for the same reasons already enumerated that the Petitioner was not sufficiently prejudiced. *Johnson,* 218 Ill. 2d at 144, 842 N.E.2d at 725.

However, given that the Court was relying on what Petitioner deems as an improper application of federal constitutional analysis, Petitioner asserts that his claims of ineffective assistance of counsel should also be re-examined.

CONCLUSION

Because of the aforementioned reasons, prosecutor's comments in opening and closing arguments creating an inference that the Petitioner had a duty to prove his own innocence constitute a violation of the Petitioner's right to due process and entitle the Petitioner to a new trial. Additionally, the failure of Petitioner's counsel to object to statements made in the prosecutor's opening and closing arguments inferring that the Petitioner had a duty to prove his own innocence violated his right to effective assistance by counsel and entitle the Petitioner to a new trial.

Respectfully submitted,
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Appendix A

IN THE SUPREME COURT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	
vs.	)	No. 99815
JAMES S. JOHNSON,	)	
Defendant.	)	

Docket No. 99815-Agenda 15-September 2005.
December 15, 2005
Dissenting Opinion on Denial of Rehearing Feb. 2, 2006

JUSTICE McMORROW delivered the opinion of the court:

In December 2003, defendant James "Steven" Johnson was tried before a jury in the circuit court of Champaign County for the offense of driving under the influence of alcohol. 625 ILCS 5/11B501(a)(2) (West 2002). During opening and closing argument, the prosecutor told the jury that defendant, by refusing to take a breath test, had failed to prove to the arresting officer that he was not guilty of the charged offense. The jury found defendant guilty and, in a divided opinion, the appellate court upheld the conviction. 353 Ill. App. 3d 954. We granted defendant's petition for leave to appeal and now affirm the judgment of the appellate court.

BACKGROUND

The facts of this case are undisputed. At about 4 p.m., on Wednesday, April 30, 2003, defendant met with a

group of friends at the Lake of the Woods Golf Course in Mahomet, Illinois, for his weekly golf game. One of defendant's golfing friends lived in a home situated along the golf course, near the sixth hole. Around 5 p.m. defendant reached the sixth hole and, as was his habit, walked to this friend's home, where he made himself a mixed drink of rum and cola, which he then took with him on the course. The golf game finished sometime around 8 p.m. and defendant then drove to a restaurant and bar called Hide-Away in the Woods (the Hide-Away), where he and his golfing friends customarily met for postgame food and drinks and to "tally up." Defendant stayed at the Hide-Away until about 9:30 p.m. and consumed two more mixed drinks of rum and cola while he was there. Shortly thereafter, defendant was stopped by an officer of the Mahomet police department and charged with driving under the influence of alcohol (DUI), in violation of section 11B501(a)(2) of the Illinois Vehicle Code (625 ILCS 5/11B501(a)(2) (West 2002)).

Defendant contested the charge and a jury trial was held. At trial, the prosecutor made an opening statement in which he outlined the evidence he planned to present. At the end of this statement, the prosecutor made the following remarks:

> "Finally, I believe you're going to hear that Mr. Johnson was given the opportunity to prove to the officer that he was not overly impaired by being offered to take what is called a breath alcohol test to determine how much alcohol was on his breath at the time, yet the defendant failed to do so.
>
> I believe at the end of this we'll have met our burden and proved to you beyond a reasonable doubt that Mr. Johnson was under the influence of alcohol and was driving a motor vehicle in Champaign County at that time, and that influence of alcohol impaired his ability to do so."

Defense counsel made no objection to anything the prosecutor said. After defendant gave his own opening statement, the State presented its only witness, Mahomet Police Officer David Parsons. Officer Parsons testified that, on April 30, 2003, at approximately 9:45 p.m., he activated his lights and initiated a traffic stop after he witnessed the truck defendant was driving move past the center line into the oncoming lane on three occasions in a 10- to 15-second period. Defendant responded immediately, appropriately pulling to the side of the road. Officer Parsons then approached the driver's side of defendant's vehicle and asked defendant for his license and insurance card. Officer Parsons testified that he immediately smelled a strong odor of alcohol, noticed that defendant's eyes were bloodshot, and detected a slight slurring of speech. In addition, Officer Parsons noted that defendant gave him a registration card instead of an insurance card, as requested, although defendant quickly complied once the error was pointed out. Officer Parsons testified that he asked defendant if he had been drinking and defendant admitted that he had "a couple."

Officer Parsons testified that he asked defendant to exit his vehicle to take some field sobriety tests. The first test he had defendant take was the "walk and turn" test. Officer Parsons testified that he told defendant to listen carefully as he explained the test and to watch closely as he demonstrated its execution. After he explained and demonstrated the test, defendant attempted it. Office Parsons testified that defendant did not follow the instructions - defendant walked "normally" instead of heel-to-toe, as instructed. Furthermore, defendant did not turn on one foot or keep his arms at his sides. According to Officer Parsons, the test permits a person to raise his arms only 6 inches, but defendant lifted his arms about 14 inches away from his body in order to maintain his balance. For the

above reasons, the officer regarded defendant's performance a failure.

Officer Parsons then gave defendant a second test, the "one-leg stand" test. This test requires the subject to stand on one leg, with arms to the side, for the count of 30 seconds. After hearing the instructions and watching Officer Parsons demonstrate the test, defendant attempted this test but put his foot down after only eight seconds. Officer Parsons also noted that defendant swayed and lifted his arms to keep his balance. Accordingly, defendant's performance on the second test was deemed a failure as well.

Officer Parsons testified that, because of his observation of defendant's improper lane usage, because defendant smelled strongly of alcohol, had bloodshot eyes and slightly slurred speech, and because defendant failed the two field sobriety tests, he believed defendant to be impaired by alcohol and, thus, placed defendant under arrest. Defendant was handcuffed and placed in the back of the squad car. Officer Parsons noted that defendant commented at this time that he didn't know why he was being arrested because he was not "that drunk."

Officer Parsons further testified that while they sat in the squad car waiting for a tow truck to come and impound defendant's vehicle, he asked defendant whether he would be willing to take a breath-alcohol test. He testified that, in conjunction with this request, he read to defendant the "Warning to Motorists," as required by state law. The "Warning to Motorists" was then read into the record by Officer Parsons for the benefit of the jury. Officer Parsons testified that he did not simply read the warning to defendant, he explained it to him, informing defendant that even if he "blew over point 8," that is, if he failed the test by being over the legal limit, his driver's license suspension would be for a shorter period than if he

did not submit to testing at all.[1] Officer Parsons further explained that the minimum penalty for a "first offender" is three months' suspension if the driver takes the test and fails, but six months' automatic suspension if the driver refuses to take the test. If the driver is not a first offender, the minimum penalty is one years' suspension if the driver takes the test and fails, but three years' automatic suspension if the driver refuses to take the test. Officer Parsons testified that defendant indicated that he understood the warning, but he declined to take the test.

Officer Parsons was thoroughly cross-examined by defense counsel. First it was established that, according to the police report, defendant was pulled over at 9:46 p.m. and his refusal to submit to the breath test occurred at 9:55, only nine minutes later. Thus, the field sobriety tests and explanation of the warning all took place in under 10 minutes. Also, Officer Parsons admitted that he asked defendant to take the test only once - while defendant was sitting, handcuffed, in the back of the police car - and he did not give defendant a copy of the warning when it was read to him. A copy of the warning was provided to defendant, as required by law, but not until nearly an hour later, when defendant was in jail. Officer Parsons also acknowledged that he had received an award one year for making more DUI arrests than anyone in his police department.

When cross-examined about his initial observations of defendant's driving, Officer Parsons admitted that defendant had not been speeding and, except for crossing

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[1]Officer Parsons may have misspoke, or his testimony may have been incorrectly transcribed. Section 11B501(a)(1) of the Vehicle Code prohibits a person from driving if the alcohol concentration in his or her breath is *0.08 or more*, not *0.8 or more*, as Officer Parsons' testimony seems to indicate.

over into the other lane, had operated his vehicle appropriately. Officer Parsons conceded that when defendant was driving along Oak Street, before he was stopped, there was a vehicle car in front of defendant and that it was possible that defendant had been crossing into the other lane to determine whether it was safe to pass. In fact, this is what defendant told the officer when he was stopped. However, Officer Parsons insisted that on at least one occasion, defendant crossed a double yellow line, where it would have been *illegal* to pass.

Officer Parsons was also questioned extensively about the conditions under which defendant took the field sobriety tests. Officer Parsons could not remember whether, when conducting the "walk and turn" test, he used the white line on the shoulder of the road or simply asked defendant to walk straight along an "imaginary" line. At trial, all he could remember was what he put in his report - that defendant did not walk in a straight line. When it was brought to his attention that, according to the United States Department of Transportation, National Highway Traffic Safety Administration, the "walk and turn" test requires a line the suspect can see, Officer Parsons responded that he was trained that an actual line was not required. Finally, Officer Parsons admitted that he did not attempt to correct defendant when he walked at a normal gait and did not place his heel to his toe, as instructed.

On redirect, Officer Parsons agreed that there are several indicators that a person is under the influence of alcohol and that defendant did not exhibit every indicator. Nevertheless, defendant crossed the center line three times, smelled strongly of alcohol and had bloodshot eyes, and failed the field sobriety tests. The combination of these indicators convinced Officer Parsons that defendant was impaired.

After Officer Parsons testified, the State rested its case. Defendant then presented a number of witnesses in

his defense. The first witness was James Capel, the owner of the home situated along the golf course and defendant's friend for 15 years. Capel testified that on April 30, 2003, he played golf with defendant and saw defendant walk to his home to get a drink at around 5 p.m. After the game, around 8 p.m., he met up with defendant at the Hide-Away. Capel testified that he left the restaurant before defendant, at about 9 p.m., and, while at the restaurant, remembered seeing defendant have one mixed drink. Capel also testified that, when he left, defendant was walking and talking normally. He noted that defendant normally spoke with a slight slur or mumble, sometimes making it difficult to understand him.

The next witness was Daniel Stites, who was the bartender at the Hide-Away restaurant on April 30, 2003. Daniel knew defendant well because his parents were good friends with defendant and defendant was Daniel's landlord. Daniel testified that defendant did not stay long at the restaurant that night and, as far as he could remember, defendant had one or two drinks during the time he was there. Daniel did not remember seeing defendant leave, but testified that defendant did not appear intoxicated or impaired by alcohol while he was at the restaurant.

Defendant's third witness was Jody Gordon. Jody had known defendant for about five years and her husband had a business relationship with defendant. She testified that she had attended a bowling banquet at the Hide-Away on the evening of April 30, 2003, and, at about 8:15 p.m., spoke to defendant in the bar area for a few minutes. She testified that, although she did not speak with defendant again before she left the restaurant at about 9 p.m., she noticed defendant walking around the bar speaking to other people or sitting at the other end of the bar area playing a video game. She testified that defendant "seemed fine."

The next witness was Miles Stites, Daniel's father and defendant's friend for over 40 years. Stites had been

having dinner at the Hide-Away on April 30, 2003, when defendant arrived there between 8 and 8:15 p.m. Stites was typically part of defendant's golfing group but had not played that day because he was visiting his sick mother in the hospital. Defendant came over to ask him how she was doing. Stites testified that he saw defendant get a drink at the bar and then play a video game. After the video game, defendant came back to the bar and sat down next to Stites. They left the bar together at about 9:30 p.m. Stites testified that defendant was walking and talking normally and did not appear affected by the alcohol he drank.

The last witness was defendant. With regard to April 30, 2003, defendant admitted that he had one drink while on the golf course and two more at the Hide-Away between 8 and 9:30 p.m. Defendant's testimony then turned to a discussion of the traffic stop. Two videotapes and a number of photographs of the road where Officer Parsons first saw defendant and where the traffic stop took place were identified by defendant and shown to the jury. Defendant admitted that he crossed the centerline of the road twice, but claimed he did so in an attempt to look past the vehicle in front of him to determine whether it was safe to pass. He used the videotapes to show the painted yellow lines on the road where he crossed the center line, disputing Officer Parsons' claim that any attempted pass would have been illegal. Defendant also used the videotapes to show the degree of slope in the road near where the field sobriety tests were conducted. Defendant testified that the two drinks he had at the Hide-Away only "relaxed" him and did not interfere with his ability to function in any way.

On cross-examination, defendant admitted that, with regard to the field sobriety tests, Officer Parsons demonstrated and explained the tests, but that he did not do the test as described because "I wasn't paying that much attention exactly how he did it. I thought I understood exactly how I was supposed to do it, so it's, you know,

mind and eyes." Defendant also admitted that alcohol can affect a person's perception, memory, judgment and recall. Thus, defendant admitted, because he had alcohol on April 30, 2003, and because he testified that the alcohol "relaxed" him, the alcohol had *some* effect and it was "possible" that his recollection of the night's events were affected. Finally, defendant admitted that Officer Parsons had read him the "Warning to Motorist" and that he indicated that he understood. When it was pointed out that he refused the test knowing that he would be facing a longer suspension of his driver's license if he refused, defendant answered:

> "That's not the reason. At the time I was handcuffed in the back of the car. You know, I just had two drinks. I don't know legally how the test results with just having two drinks. I wasn't going to put myself in that position so I declined to take the test. I was scared. He was not acting in my favor, I didn't feel."

The prosecutor restated the question, asking whether defendant had understood that the penalty would be greater for not taking the test. Defendant said:

> "At that particular point I just wanted to - no more tests, just get it over with."

Following defendant's testimony, the prosecutor gave his closing argument. The prosecutor began by admitting that "it's pretty clear that Mr. Johnson was not falling down drunk." However, he argued that, after jury instructions, it would also be clear that all the State had to prove was that, as a result of drinking any amount of alcohol, defendant's mental and physical ability was impaired to the degree that he was not acting with reasonable care. The prosecutor suggested that he had met this burden.

At the close of his argument, the prosecutor stated:

> "Officer Parsons thought that [defendant] was impaired based on his performance on the field sobriety test, based on the alcohol that he smelled,

based on watching [defendant] drive, based on the fact that [defendant] gave him the wrong card initially, gave him a registration card instead of an insurance card.

He said, you know what? I am going to give you one more chance to prove that you're not guilty of this offence. Take a breath test. You're aware of the penalties that might result with this test and as a result of not taking it at all.

You heard Mr. Johnson testify. He understood it. He knew what he was doing. He refused. He didn't want to take the risk. He took the stiffest penalty right off the bat. He wouldn't take the chance to prove it once and for all."

Defense counsel made no objections to the above remarks and in rebuttal closing argument, the prosecutor never made another reference to defendant's refusal to take the breath test.

After being instructed, the jury deliberated for about four hours. It returned a verdict of guilty to the charge of driving while under the influence of alcohol. Defendant filed a posttrial motion seeking judgment notwithstanding the verdict (*n.o.v.*) or, in the alternative, a new trial. At the hearing on the motion, defendant argued that the evidence was insufficient to support the guilty verdict as a matter of law. In the alternative, defendant argued that, because the evidence was so closely balanced, the prosecutor's improper argument confused the jurors and, thus, tipped the balance against the defendant. Defense counsel admitted that the court could find the error procedurally defaulted because he had not "caught" the error and failed to lodge an objection at trial. Nevertheless, he argued that the matter should be reviewed as plain error.

In response, the prosecutor agreed that the issue was procedurally defaulted. However, he also argued that, if the court considered the issue on its merits, the court should

find that the remarks, though admittedly erroneous, were harmless. The prosecutor urged the court to view the improper remarks in the context of the entire argument and argued that, when viewed in this context, it was clear that the remarks could not have affected the verdict.

The trial court denied defendant's post trial motion. The court agreed that the prosecutor's remarks were error. Indeed, the court found them to be an error of A "[c]onstitutional magnitude." The trial court stated that, had an objection been made, the error would have been cured by a strongly worded admonishment to the jury. The court also agreed that the evidence was "closely balanced." Nevertheless, the trial judge, admitting that he was "by no means confident of [his] position," held: "I am not convinced that a fair trial was so subverted by the comments as to require the Court to grant the post-trial motion." The judge noted that the error was not "overly emphasized," having been mentioned in a couple of lines. Accordingly, defendant's posttrial motion was denied. Defendant appealed.

As noted earlier, the appellate court reviewed the matter and, in a divided opinion, upheld the verdict. First, the court rejected defendant's claim that the evidence was insufficient, holding that, although defendant had proffered reasonable explanations for most of his actions, his evidence "was not so strong that we can conclude that no rational trier of fact could have convicted defendant in this case." Next, the reviewing court held that the prosecution's opening and closing remarks were not plain error. In fact, the appellate court held that the prosecutor's remarks were not error at all. The court held that "evidence of a defendant's refusal to take a breath test is relevant and admissible" and the prosecutor's statements "drew a legitimate inference from the evidence that was properly admitted during the trial." 353 Ill. App. 3d at 958. One justice dissented. He believed that the prosecutor's remarks

were error and sufficiently prejudicial to warrant a new trial.

Defendant petitioned this court for leave to appeal, which we granted. 177 Ill. 2d R. 315(a).

ANALYSIS

In the appeal to this court, two issues are raised: (1) whether defendant is entitled to a new trial because comments made by the prosecutor in opening and closing argument constitute plain error, and (2) whether defendant is entitled to a new trial because his trial counsel's failure to object to the prosecutor's comments constitutes ineffective assistance of counsel.

With respect to the first issue, defendant argues that the appellate court erred when it held that it was not improper for the prosecutor to have told the jury, in his opening statement and closing argument, that defendant failed to prove his innocence to the police officer by refusing to take the breath test. Defendant contends that the prosecutor's remarks created the inference that he had a duty to prove he own innocence and, thus, shifted the burden of proof to him. Defendant argues that reversal is required, despite his counsel's failure to object, because the evidence was closely balanced and the error denied him a fair trial.

Similarly, in his second issue, defendant contends that, because the prosecutor's remarks shifted the burden of proof and denied him a fair trial, he was unfairly prejudiced by his counsel's failure to object to the remarks. Accordingly, defendant contends he received ineffective assistance of counsel.

Initially, we note that because defendant did not object to the prosecutor's remarks at trial, any issue concerning the propriety of the prosecutor's comments has been procedurally defaulted. *People v. Enoch*, 122 Ill. 2d

176, 186 (1988) (both a trial objection and a written posttrial motion raising the issue are necessary to preserve an issue for review). However, as this court recently noted in *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005):

> "[T]he plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence."

In the case at bar, defendant contends that review for plain error, pursuant to the plain-error doctrine, is warranted because the evidence at trial was closely balanced. We agree that, at trial, defendant presented evidence which tended to refute much of the State's evidence showing defendant was under the influence of alcohol. Thus, we agree that review under the first prong of the plain-error doctrine is warranted, despite the procedural default. Accordingly, we shall go on to consider whether the prosecutor's remarks resulted in plain error, that is, whether the comments were sufficiently prejudicial to warrant reversal. *Herron*, 215 Ill. 2d at 187 ("[i]n the first instance, the defendant must prove 'prejudicial error'"); *People v. Sims*, 192 Ill. 2d 592, 623 (2000) (plain errors are reversible errors).

One issue is at the core of both of defendant's claims-whether the prosecutor's remarks were, in fact, improper. Clearly, there can be no plain error if there is no error (*Herron*, 215 Ill. 2d at 184; *Sims*, 192 Ill. 2d at 621) and, since an attorney's performance is ineffective only if it falls below an objective standard of reasonableness (*People v. Evans*, 209 Ill. 2d 194, 220 (2004)), counsel cannot be deficient if he fails to object to remarks which are not improper. Thus, before we can determine whether there

was plain error or ineffective assistance of counsel, we must first decide whether there was error.

As noted above, the appellate court majority found that the prosecutor's remarks were not error but, rather, legitimate inferences drawn from properly admitted evidence. 353 Ill. App. 3d at 958. One justice disagreed; he found the remarks to be error and believed that the majority's ruling "sets a dangerous precedent." 353 Ill. App. 3d at 960 (Turner, J., dissenting). The dissenting justice was concerned that, if such remarks were held to be proper, prosecutors would be encouraged to argue, in all cases in which a driver refuses to submit to testing, that the driver failed to prove his innocence to the police officer who offered the test, thereby subverting the bedrock principle that the State has the burden to prove guilt beyond a reasonable doubt and that a defendant is never bound to prove himself innocent. 353 Ill. App. 3d at 959-60.

We agree with the prosecutor, the trial court judge, and the dissenting appellate justice and find that the remarks made in opening and closing argument, which suggest that defendant failed to prove his innocence to the police officer by failing to take the breath test, were improper and that, as a result, error occurred. It is true, as the appellate court held, that evidence of a person's refusal to take a test designed to determine the person's blood-alcohol content is admissible and may be used to argue the defendant's consciousness of guilty. See *People v. Rolfingsmeyer*, 101 Ill. 2d 137, 141 (1984) (because a driver has no constitutional right to refuse a breath test and may be compelled by the State to take such a test, evidence of the driver's refusal to take such a test does not violate the self-incrimination privilege and may properly be admitted at trial); *People v. Garriott*, 253 Ill. App. 3d 1048, 1052 (1993) (section 11B501.2(c) of the Code provides that evidence of a refusal shall be admissible at trial of a DUI and, thus, the legislature has determined that evidence of

such a refusal is relevant as circumstantial evidence of the driver's consciousness of guilt). However, we believe, as did the dissenting appellate justice, that the argument complained of in the case at bar goes beyond such legitimate purpose and "blur[s] the distinction between the defendant's state of mind and the State's burden of proof and thus should not be permitted." 353 Ill. App. 3d at 960. Moreover, like the trial judge in the case at bar, we feel strongly that the argument here, which implied that defendant might have proven his innocence by submitting to a breath test, is in conflict with the constitutional principle that a defendant is innocent until proven guilty. This type of argument should not be countenanced.

That having been said, our finding that the prosecutor's remarks were improper does not end our inquiry. An error, even one affecting constitutional rights, does not necessitate reversal in every instance. "[T]here may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless ***." (Emphasis omitted.) *Girot v. Keith*, 212 Ill. 2d 372, 382 (2004), quoting *Chapman v. California*, 386 U.S. 18, 22, 17 L. Ed. 2d 705, 709, 87 S. Ct. 824, 827 (1967). The question, then, is whether, in the case at bar, the improper remarks made in opening and closing argument were sufficiently prejudicial so as to require reversal.

Addressing this question, we recall that any statement must be considered in the context of the closing argument as a whole (*People v. Evans*, 209 Ill. 2d 194, 225 (2004)), and "[a] reviewing court will find reversible error based upon improper comments during closing arguments only if a defendant can identify remarks of the prosecutor that were both improper and so prejudicial that 'real justice [was] denied or that the verdict of the jury may have resulted from the error' " (*Evans*, 209 Ill. 2d at 225, quoting

People v. Jones, 156 Ill. 2d 225, 247-48 (1993), quoting *People v. Yates*, 98 Ill. 2d 502, 533 (1983)).

We are mindful, too, that it is defendant who bears the burden of persuasion on this issue. As noted in *People v. Thurow*, 203 Ill. 2d 352 (2003), plain-error analysis requires the same kind of inquiry as does harmless-error review. In both instances the crucial issue is whether the error is so substantial that it undermines our confidence in the jury verdict. But where the defendant has made a timely objection and the reviewing court must decide whether the preserved error was harmless, the State " 'bears the burden of persuasion with respect to prejudice.'" *Thurow*, 203 Ill. 2d at 363, quoting *United States v. Olano*, 507 U.S. 725, 734, 123 L. Ed. 2d 508, 520, 113 S. Ct. 1770, 1778 (1993). On the other hand, where, as here, the defendant has failed to make a timely objection, a plain-error analysis applies and " '[i]t is the defendant rather than the [State] who bears the burden of persuasion with respect to prejudice.'" *Thurow*, 203 Ill. 2d at 363, quoting *Olano*, 507 U.S. at 734, 123 L. Ed. 2d at 520, 113 S. Ct. at 1778.

In the case at bar, the State contends that defendant has not met his burden of persuasion because the prosecutor's improper comments, when viewed in the context of the arguments as a whole, did not deprive defendant of a fair trial. We agree.

The prosecutor did not rely on the fact that defendant did not take the breath test to prove his case against defendant. The State's witness, Officer Parsons, testified that he stopped defendant after he observed defendant move into the on-coming lane on three occasions and, after stopping defendant, he noted that defendant smelled of alcohol, had slightly slurred speech, failed to produce his insurance card when first requested, and failed two sobriety tests. Defendant admitted, and his own trial witnesses confirmed, that defendant had at least two alcoholic drinks shortly before his arrest. In addition, when

cross-examined at trial, defendant admitted that the alcohol he had consumed on the night in question had "relaxed" him and, for that reason, his own recall of the night could have been affected.

In closing argument the prosecutor repeated what he had said in his opening argument, *i.e.*, that defendant had an opportunity to prove his innocence by taking a breath test, but refused. This comment, though improper, was brief, amounting to only a few lines of the 15-page transcribed argument. Moreover, the notion that defendant "failed to prove his innocence" was not stressed. The prosecutor began and ended his closing argument by explaining to the jury *the State's* burden of proof. The prosecutor admitted that the evidence showed that defendant was not "falling down drunk," but argued that it was not necessary to prove that defendant was "falling down drunk," only that defendant was under the influence of alcohol. The prosecutor painstakingly reviewed all of the evidence, pointing out the many signs of impairment that had been shown. It is noteworthy, too, that the fact that defendant did not take the breath test was never mentioned in rebuttal closing argument.

Having considered the prosecutor's improper remarks in the context of the closing argument as a whole, we find that defendant has failed to persuade us that the verdict would not have been the same had the improper remarks been omitted. We find that the prosecutor's improper remarks were not so prejudicial that real justice was denied. We are convinced that the jury verdict was unaffected by the improper comments. We conclude that defendant was not deprived of a fair trial, that no plain error occurred, and, thus, reversal is not warranted.

For similar reasons, we also find that reversal in not required due to ineffective assistance of counsel. Claims of ineffective assistance of counsel are judged according to the two-prong, performance-prejudice test established in

Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). *People v. Lawton*, 212 Ill. 2d 285, 302 (2004); *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). Under *Strickland*, a defendant must prove not only that defense counsel's performance fell below an objective standard of reasonableness, but also that this substandard performance caused prejudice by creating a reasonable probability that, but for counsel's errors, the trial result would have been different. *People v. Evans*, 209 Ill. 2d 194, 219-20 (2004).

In the case at bar we have already determined that the prosecutor's comment's were improper. It follows that defense counsel erred by failing to lodge an objection to the remarks. Nevertheless, even if counsel's failure to object amounts to deficient performance, we do not find that defendant was sufficiently prejudiced by this deficient performance. As we have already concluded, the prosecutor's improper closing remarks did not deny defendant a fair trial. Thus, there is no reasonable probability that, but for counsel's failure to object, the result of the trial would be different. We conclude, therefore, that defendant has not sustained his claim that he received ineffective assistance of counsel and, accordingly, reversal on this basis is not warranted.

CONCLUSION

For the reasons stated, we affirm the judgment of the appellate court.

Affirmed.

JUSTICE FREEMAN, dissenting:

Although I agree with the court that the prosecutor's comments were improper, I cannot agree with the

conclusion that a new trial is unwarranted in this case. Therefore, I respectfully dissent.

As the court correctly notes, the error which occurred in this case conflicts with the constitutional principle that a defendant is innocent until proven guilty. Slip op. at 12. Therefore, in accordance with *California v. Chapman*, the question we must answer in determining if a new trial is required is whether, absent the constitutional error, "it is clear beyond a reasonable doubt that the jury would have returned a guilty verdict." *People v. Smith*, 152 Ill. 2d 229, 269 (1992). After reviewing the evidence in this case and the complained-of argument, it is not clear to me, beyond a reasonable doubt, that the jury verdict was unaffected by the improper comments.

The impropriety of the comments at issue stems from the fact that they "reasonably could confuse the jury regarding the presumption of innocence and burden of proof." 353 Ill. App. 3d at 960 (Turner, J., dissenting). The effects of juror confusion in cases like this, where this court acknowledges the closeness of the evidence, are not readily discernible. For this reason, I find that it is impossible to say with certainty that the error did not help to sway the jury to a finding of guilty as opposed to a finding of not guilty. The record reveals that defendant called four witnesses who were with him before his arrest, each of whom disputed that defendant displayed the signs of intoxication allegedly observed by Officer Parsons. Defendant testified that he did not cross the center of the road because of intoxication, but rather because he was trying to assess whether he could safely pass the car in front of him. Officer Parsons admitted that a car was in front of defendant at the time he pulled him over, but that it was illegal to pass in that area. Defendant presented the jury with videotapes of the road where the arrest occurred, which established that passing in that area was, in fact, legal. Given the nature of this and the other conflicting

testimony adduced at trial, I cannot discount the possibility that the jury could have used the improper remark to tip the balance in favor of the State. In any case, I cannot say with certainty that the jury did not use the improper remark in that way.

Finally, the court's conclusion that the error was harmless does much to dilute its recognition of the impropriety of the remark in the first place. If making such a remark is deemed harmless in a case like this, where the defense has successfully damaged the credibility of the arresting officer-the sole witness for the prosecution-with videotaped evidence, I cannot fathom under what circumstances this error will ever be deemed harmful enough to warrant a new trial. In my opinion, this kind of result leaves little incentive for the State to avoid making the improper remark in future cases.

Thus, for the all of the foregoing reasons, I dissent.

JUSTICE KILBRIDE joins in this dissent.

Appendix B

IN THE SUPREME COURT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	
vs.	)	No. 99815
JAMES S. JOHNSON,	)	
Defendant.	)	

Docket No. 99815-Agenda 15-September 2005.
February 2, 2006

Petition for Rehearing Denied.

Justice FREEMAN, dissenting upon denial of rehearing:

I respectfully dissent from the court's order denying rehearing in this case. I write separately in order to explain why I believe rehearing should be granted.

Defendant's position in this matter has been hampered by his procedural default of the issue regarding the prosecutor's remarks. Defendant's attorney did not properly preserve the issue because he neither objected to the comments at trial nor did he include the matter in the posttrial motion. Under our plain error rule, a defaulted issue will only be recognized if the evidence is closely balanced or the error is so serious that it erodes the integrity of the judicial process and undermines the fairness of the defendant's trial. See *People v. Herron,* 215 Ill.2d 167, 185-

86, 294 Ill.Dec. 55, 830 N.E.2d 467 (2005). The court acknowledged in its opinion that the evidence in this case was close. Thus, defendant has satisfied the first prong of the plain error rule. I also believe that defendant has satisfied the second prong of the rule, as well. As the court itself states, "we feel strongly that the argument here, which implied that defendant might have proven his innocence by submitting to a breath test, *is in conflict with the constitutional principle that a defendant is innocent until proven guilty.*" (Emphasis added.) 218 Ill.2d at 140-41, 299 Ill.Dec. at 686, 842 N.E.2d at 723.

I remind my colleagues that the constitutional presumption of innocence "lies at the foundation of the administration of our criminal law." *Coffin v. United States,* 156 U.S. 432, 453, 15 S.Ct. 394, 403, 39 L.Ed. 481, 491 (1895). On this record, we do not, and cannot, know the effect the prosecutor's remarks had on the jury's deliberations. However, I submit that an argument that has the potential to confuse the jury about the presumption of innocence and the State's burden of proof strikes at the core of our criminal jurisprudence and serves to compromise any verdict of guilt rendered by that jury. In this case, it is difficult to have any confidence in the verdict because it was reached by a jury that was given mixed messages on the burden of proof, which in turn negatively impacted upon defendant's constitutional right to the presumption of innocence. Given the critical importance of the presumption of innocence in our criminal justice system, I believe that it is questionable that this kind of error can ever be found harmless, even in a case where the evidence is overwhelming. However, this was not a case of overwhelming evidence. To the contrary, this was a closely balanced case, as the court recognized, and for that reason, it simply is impossible to say, beyond a reasonable doubt, that" the error complained of did not contribute to the

verdict obtained." *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 711 (1967). My colleagues' continuing failure to recognize these principles establishes a troubling precedent that allows prosecutors to denigrate the constitutional presumption of innocence with impunity.

For these reasons, I would grant rehearing in this case and respectfully dissent from the court's order denying defendant's petition.

Justice KILBRIDE joins in this dissent.

Appendix C

IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	
vs.	)	No. 4-04-0127
JAMES S. JOHNSON,	)	December 3, 2004
Defendant.	)	

JUSTICE COOK delivered the opinion of the court:

Defendant, James S. Johnson, appeals from his conviction for driving under the influence (DUI) November 29, 2004 (625 ILCS 5/11-501(a)(2) (West 2002)). On appeal, defendant argues that (1) the guilty verdict was against the manifest weight of the evidence, (2) the prosecutor's remarks during closing arguments about defendant's refusal to submit to a breath test were prosecutorial misconduct, (3) defense counsel's failure to object to the prosecution's improper references during the trial was ineffective assistance of counsel, and (4) the prosecutor's improper references during opening and closing statements at trial were plain error. We affirm.

At about 9:45 p.m. on April 30, 2003, Mahomet police officer David Parsons stopped defendant's car after he observed defendant cross the centerline of the roadway three times in a short amount of time. When Parsons confronted defendant, he noticed a strong odor of alcohol on defendant's breath. He also noticed that defendant's speech was slurred and his eyes were bloodshot. Parsons

asked defendant for his license and insurance card, and defendant mistakenly handed him his license and registration. When Parsons pointed out the mistake, defendant provided his insurance card. At this point, Parsons informed defendant that he noticed a strong odor of alcohol on his breath. Defendant admitted that he had been drinking that evening.

Parsons then asked defendant if he would submit to some field sobriety tests. Defendant complied and exited his vehicle. Parsons had defendant complete a "walk and turn" test and a "one-leg stand" test. The "walk and turn" test consists of the subject walking heel to toe in a straight line with his arms at his sides, then pivoting and returning in the same manner. Parsons testified that defendant failed the "walk and turn" test because he displayed four indicators of impairment and individuals are only allowed two. Parsons testified that defendant had to be reminded several times to keep his right foot closely in front of his left foot, failed to perform the test at a normal gait, and raised his arms approximately 14 inches from his body. Parsons also testified that defendant was unable to pivot on his left foot without pausing to regain his balance.

Defendant also failed the "one-leg stand" test. The test requires that an individual balance on one leg for approximately 30 seconds. Like the "walk and turn" test, in the "one-leg stand" test, a person is only permitted two indicators of impairment. Defendant displayed three indicators. Parsons testified that defendant swayed while doing the exercise, that his arms were about 10 inches from his sides, and that he put his foot down after only 8 seconds. Parsons determined that defendant was under the influence of alcohol and placed defendant under arrest.

Parsons placed defendant in the back of his squad car, and the two men waited for a tow truck to arrive. While they were sitting in the car, defendant remarked that he was "not that drunk." Parsons read defendant the

warning to motorists, which informs individuals of the different penalties that may result from one's refusal to submit to chemical testing as well as the penalties if one submits to the testing. Although officers are required to provide a copy of the warning to motorists to the individual, Parsons did not provide a copy of the warning to defendant until almost an hour later, when defendant was in jail. Defendant informed Parsons that he understood the penalties described in the warning and declined to submit to a breath test.

On December 4, 2003, the trial court conducted a jury trial in the matter. Parsons testified on behalf of the State. In addition to himself, defendant had several witnesses testify on his behalf. Defendant's witnesses had been with him at the Hide-Away of the Woods, and all testified that defendant did not display any signs of impairment or intoxication. On December 5, 2003, the jury convicted defendant. This appeal followed.

Defendant first argues that the State failed to prove him guilty of DUI beyond a reasonable doubt. "A criminal conviction will not be set aside on appeal unless the evidence is so improbable or unsatisfactory that there remains a reasonable doubt of the defendant's guilt." People v. Ehlert, 211 Ill. 2d 192, 202, 811 N.E.2d 620, 625 (2004). "The question on review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational fact finder could have found defendant guilty beyond a reasonable doubt." Ehlert, 211 Ill. 2d at 202, 811 N.E.2d at 625. It is the jury's responsibility to determine the witnesses' credibility and the weight given to their testimony, to resolve conflicts of the evidence, and to draw reasonable inferences from the evidence. People v. Ortiz, 196 Ill. 2d 236, 259, 752 N.E.2d 410, 425 (2001). We hold that the evidence presented at trial was sufficient for the jury to find defendant guilty beyond a reasonable doubt.

The evidence presented by the State showed that Parsons was justified in pulling defendant's car over. When Parsons approached defendant, defendant had red eyes, slurred speech, and a strong smell of alcohol on his breath. Further, when asked to provide his license and proof of insurance, defendant provided his registration instead of proof of insurance. Defendant admitted that he had consumed alcoholic beverages. Parsons then asked defendant to perform field sobriety tests. Parsons testified that defendant failed both sobriety tests and explained the various factors he used in making his determination. While in the police car, defendant remarked to Parsons that he was "not that drunk." Additionally, defendant refused to submit to a breath test when requested by the police.

Defendant argued at trial that he had a legitimate reason for crossing the centerline, which was to attempt to pass a car in front of him. This does not change the fact that Parsons was still justified in pulling him over. Defendant does not challenge the fact that he did cross the centerline, which is the reason he was initially stopped. Defendant also argued that the field tests were not performed in accordance with the guidelines provided by the United States Department of Transportation, National Highway Traffic Safety Administration, or the Illinois State Police. He argues that the tests were conducted, not on a level surface, but on the side of the roadway where there was a slight slant. Further, he argued that Parsons did not designate a line for defendant to follow while completing the "walk and turn" test. Defendant provided a video to the jury, showing the condition of the site where the tests took place. The jury was able to view and determine whether the slant of the road was such that a sober driver would have been able to properly perform the field tests.

The State's evidence was sufficient to prove defendant guilty of DUI. Although defendant presented reasonable justifications for most of his actions, the jury

obviously gave more weight to Parsons's observations. As we stated previously, it is the jury's duty to weigh the evidence presented and draw conclusions from that evidence. Ortiz, 196 Ill. 2d at 259, 752 N.E.2d at 425. The evidence presented by defendant is not so strong that we can conclude that no rational trier of fact could have convicted defendant in this case. The evidence presented by the State was sufficient to convict defendant beyond a reasonable doubt of DUI.

Defendant next argues that the prosecutor's remarks during opening and closing statements about defendant's refusal to submit to a breath test were prosecutorial misconduct. Attorneys are allowed latitude in their closing statements. People v. Castaneda, 299 Ill. App. 3d 779, 784, 701 N.E.2d 1190, 1192 (1998). "A prosecutor may comment on the evidence and draw all legitimate inferences deducible therefrom, even if they are unfavorable to the defendant." People v. Taylor, 345 Ill. App. 3d 1064, 1081, 804 N.E.2d 116, 129 (2004). "In reviewing a challenge to remarks made by the prosecutor during closing argument, the comments must be considered in the context of the parties' closing arguments as a whole." Taylor, 345 Ill. App. 3d at 1081, 804 N.E.2d at 129. Reversible error results when comments by a prosecutor cause such substantial prejudice against a defendant that it is impossible to say whether or not a verdict of guilt resulted from those comments. Castaneda, 299 Ill. App. 3d at 784, 701 N.E.2d at 1192. There is a similar requirement in opening statements, that reversible error only results when the prosecutor's statements result in substantial prejudice against defendant. People v. Leger, 149 Ill. 2d 355, 392, 597 N.E.2d 586, 602 (1992).

Here, the prosecutor told the jury in his opening statement that it would "hear that [defendant] was given an opportunity to prove to the officer that he was not overly impaired by being offered to take what is call[ed] a breath

alcohol test to determine how much alcohol was on his breath at the time, yet the defendant failed to do so." During closing arguments, the prosecutor said that Parsons gave defendant "an opportunity to prove once and for all that he wasn't impaired." The prosecutor summarized Parsons's testimony by stating:

> "He said, you know what? I am going to give you one more chance to prove that you're not guilty of this offense. Take a breath test. You're aware of the penalties that might result of taking it and passing it or not taking it at all."

Finally, the prosecutor summarized defendant's decision not to take the breath test by telling the jury:

> "He knew what he was doing. He refused. He didn't want to take the risk. He took the stiffest penalty right off the bat. He wouldn't take the chance to prove it once and for all."

Defendant argues that these statements are prosecutorial misconduct because they improperly shift the burden of proof, requiring defendant to prove his innocence rather than the prosecution having to prove his guilt. We disagree. Evidence of a defendant's refusal to take a breath test is relevant and admissible. 625 ILCS 5/11-501.2(c)(1) (West 2002); see also People v. Garriott, 253 Ill. App. 3d 1048, 1052, 625 N.E.2d 780, 784 (1993) (refusal to submit to Breathalyzer test is relevant as circumstantial evidence of the defendant's consciousness of guilt). The trier of fact can infer that a defendant refused to submit to the test because it would confirm that he was DUI. Garriott, 253 Ill. App. 3d at 1052, 625 N.E.2d at 784. The prosecutor's statements drew a legitimate inference from the evidence that was properly admitted during the trial. No prejudice resulted to defendant from the prosecutor's statements. It

was not error for the trial court to allow the prosecutor's opening and closing statements.

Defendant also argues that defense counsel's failure to object to the prosecutor's remarks during trial was both plain error and ineffectual assistance of counsel. Because we have already stated that the prosecutor's statements were not error and, further, did not prejudice defendant, no error was made by defense counsel in not objecting to the statements.

For the foregoing reasons, we affirm the trial court's judgment.

Affirmed.

MYERSCOUGH, J., concurs.

TURNER, J., dissents.

JUSTICE TURNER, dissenting:

I respectfully dissent. In my view, the prosecutor's comments impermissibly shifted the burden of proof, and I would therefore reverse the trial court's judgment and remand for a new trial.

Here, the prosecutor in his opening statement and twice in his closing statement referenced defendant's failure to prove he was not impaired or "not guilty." Although the prosecutor's argument was set forth in the context of defendant's failure to provide proof to the arresting officer rather than the jury, I believe the multiple references to the term "prove" impermissibly shifted the burden of proof and deprived defendant of a fair trial. In People v. Kane, 223 Ill. App. 3d 377, 379, 584 N.E.2d 1044, 1045 (1991), the State presented evidence of the defendant's refusal to submit to a test designed to determine whether the defendant was under the influence of alcohol. This court found such evidence helpful to the trier of fact and noted the "jury could have inferred defendant's actions during the observation period showed he refused the test because he knew it would have confirmed he was driving under the

influence." Kane, 223 Ill. App. 3d at 385, 584 N.E.2d at 1049.

In Garriott, 253 Ill. App. 3d at 1052, 625 N.E.2d at 784, this court further elaborated on the admissibility of a defendant's refusal to submit to a Breathalyzer test as follows:

> "Section 11-501.2(c) of the Code, providing that evidence of a refusal shall be admissible at trial of a DUI *** represents a legislative determination that evidence of such a refusal is relevant. In effect, the legislature has determined that a driver's refusal to submit to a [B]reathalyzer test is relevant as circumstantial evidence of his consciousness of guilt. [Citations.] The evidence of a driver's refusal exposes him to an inference regarding his state of mind about the likely results of that test. [Citation.] The trier of fact could infer that he refused because he knew the [B]reathalyzer test would confirm he was driving under the influence. [Citation.] This evidence is probative to the issue of intoxication. [Citation.] Thus, a driver's refusal is relevant because it implies that he believes he is intoxicated, something he is clearly in a prime position to appraise." (Emphasis in original.)

Here, the State argues the prosecutor's remarks, when placed in proper context, were not improper because they refer to defendant's state of mind in making his decision to refuse to take the test. I could agree with the State if the prosecutor had omitted references to defendant's failure to prove he was not guilty or not impaired.

Our supreme court has found that "no rule is more firmly settled than that a defendant in a criminal case is not bound to prove himself innocent, but the State must prove him guilty beyond a reasonable doubt, the defendant being presumed innocent." People v. Magnafichi, 9 Ill. 2d 169,

174, 137 N.E.2d 256, 259 (1956); see also People v. Weinstein, 35 Ill. 2d 467, 470, 220 N.E.2d 432, 434 (1966) (burden of proving beyond a reasonable doubt all the essential elements of a crime never shifts to the accused but remains the responsibility of the prosecution); People v. Benson, 19 Ill. 2d 50, 61, 166 N.E.2d 80, 86 (1960) ("it is not for the defendant to establish his innocence, but for the People to establish his guilt").

The majority today sets a dangerous precedent, which in my view, departs from time-honored principles of jurisprudence. Perhaps a jury will not always fully appreciate the subtlety of a prosecutor's argument relating to a defendant's guilty state of mind as opposed to a defendant's failure to prove he is not guilty. Perhaps, as well, a jury may be able to discern a difference between a defendant proving his innocence to a police officer as compared to proving his innocence to the jury itself. Nonetheless, the State should eschew argument that reasonably could confuse the jury regarding the presumption of innocence and burden of proof, and in my view, the majority errs today in condoning such conduct. From this day forward, DUI prosecutors in cases involving a refusal will be totally uninhibited from telling the jury a defendant who refuses a breath test has failed to prove his innocence to the police officer who offered the test. From my perspective, this is shifting the burden of proof to defendant, and even if the majority is correct that such argument does not shift the burden, it is simply too close to doing so for my comfort zone.

Prosecutors most assuredly should be allowed to elicit evidence of a defendant's refusal and argue such refusal is evidence that defendant must have believed he could not pass the breath test. However, further arguing defendant failed to prove he was "not guilty" to the officer who offered the test tends to blur the distinction between

the defendant's state of mind and the State's burden of proof and thus should not be permitted.